

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2011 MSPB 5

Docket No. PH-0752-10-0143-I-1

**Thomas Hoever,
Appellant,**

v.

**Department of the Navy,¹
Agency.**

January 7, 2011

Thomas Hoever, Forked River, New Jersey, pro se.

Steven P. Stoer, Philadelphia, Pennsylvania, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision that reversed the appellant's reduction in pay because he was not provided with notice

¹ The appellant was part of a mass transfer of employees and functions to the Department of the Air Force, which, based on witness testimony, occurred on October 1, 2009. *See* Hearing Transcript (HT) at 7. The Personnel Action Form in the record provides that the effective date was actually Sunday, October 11, 2009, which was the beginning of a new pay period. Initial Appeal File (IAF), Tab 11 at 7. Because the action in question was effected by the Department of the Navy just before the transfer, it agreed to defend the case.

and an opportunity to respond before it was effected. For the reasons set forth below, we GRANT the agency's petition, REVERSE the initial decision, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant filed a Board appeal, claiming that he was effectively demoted on September 27, 2009. Initial Appeal File (IAF), Tab 1 at 3, 5. He asserted that he was selected for a promotion from his position as a WS-11 Crane Operator Supervisor (\$38.77 per hour), to the position of YC-02, Supervisory Production Superintendent,² a National Security Personnel System (NSPS) position, with an annual salary of \$105,000.³ *Id.* at 5; *id.*, Tab 9, Exhibit (Ex.) 4e at 4; *id.*, Tab 22 at 5. The appellant asserted that he accepted that salary and began performing the duties of a Supervisory Production Superintendent. IAF, Tab 1 at 5. He asserted that the promotion was cancelled and that he was instead deemed to have been reassigned to the position at an annual rate of \$84,958. *Id.*, Tab 22 at 7. He further asserted that this later action was cancelled and he was again deemed promoted with a salary of \$86,116. *Id.* The appellant asserted that, even though his rate of pay increased as a Supervisory Production Superintendent, he lost \$20,000 per year due to lost overtime. IAF, Tab 1 at 5; *id.*, Tab 5 at 3. He also asserted that he attempted to decline the promotion but that his previous position had been filled. *Id.*, Tab 1 at 5.

¶3 In response, the agency asserted that the appellant's promotion resulted in an increase in his base salary. IAF, Tab 7 at 5. The agency also asserted that the

² On October 1, 2009, Joint Base McGuire-Dix-Lakehurst stood up as a new installation. Prior to this date, agency officials sought to fill as many vacant civilian personnel positions as possible in order to avoid the more lengthy staffing process in place under the Department of the Air Force. IAF, Tab 21 at 5.

³ The appellant initially asserted that he was offered the position of Supervisory Production Superintendent at a salary of \$109,000, but following witness testimony, he testified that the salary discussed was \$105,000. *See* IAF, Tab 1 at 5; HT at 59.

appellant voluntarily accepted his ultimate pay level. *Id.* The agency asserted that the appellant was notified of his selection for the position of Supervisory Production Superintendent and of the recommendation by Gregory Minnick, Production Manager, that the appellant receive a 10 percent salary increase to \$89,004. *Id.*, Tab 21 at 5; HT at 48. It further asserted, however, that, while Mr. Minnick and Peter Mignogna, the Production Division Manager for Naval Facilities Engineering Command, Mid-Atlantic (NAVFAC MIDLANT) Public Works Department, agreed to a 10 percent salary increase, higher officials at NAVFAC MIDLANT returned the Pay Setting Worksheet (PSW) on September 29, 2009, as a reassignment with a 5 percent pay raise. *Id.*, Tab 21 at 5. The appellant was reassigned, effective September 27, 2009, at a salary of \$84,958. *Id.* at 6; *see* IAF, Tab 11 at 9. Subsequently, NAVFAC MIDLANT officials reviewed the action and changed it to a promotion with a 6.43 percent increase to a salary of \$86,116. IAF, Tab 21 at 6. An SF-50B promotion action was approved on January 27, 2010, and made retroactively effective to September 27, 2009. IAF, Tab 18 at 4.

¶4 After holding a status conference, the administrative judge found that the appellant was not demoted because his hourly rate of pay and annual rate of pay had increased without considering the potential for overtime. IAF, Tab 19 at 1. The administrative judge found, however, that the appellant made a nonfrivolous allegation that his promotion with a new salary of \$105,000 was cancelled after he accepted it. *Id.* The administrative judge thus held a hearing focusing on this issue.

¶5 Following the hearing, the administrative judge reversed the agency's action and ordered the agency to retroactively promote the appellant with a salary of \$89,004 per year, effective September 27, 2009. IAF, Tab 28, Initial Decision at 12. The administrative judge found that, while the appellant was told initially that he would be promoted with a salary of \$105,000, that salary level was erroneous and did not take effect before it was revoked. *Id.* at 10. However, the

administrative judge further found that the appellant's 10 percent salary increase to \$89,004 was revoked after he served in the position. *Id.* The administrative judge found that the appellant was offered and accepted a 10 percent raise on September 29, 2009, and that his subsequent acceptance of a 5 percent raise and a reassignment was a nullity because the action was later determined to be a promotion, not a reassignment. *Id.* at 11. The administrative judge found that the appellant served in the Supervisory Production Superintendent position for many months before the 10 percent raise was cancelled and replaced with a 6.43 percent raise to \$86,116. *Id.* The administrative judge therefore concluded that the appellant's pay was reduced from \$89,004 to \$86,116 without notice or an opportunity to respond and thus must be reversed. *Id.* at 11-12.

¶6 The agency has filed a petition for review.⁴ Petition for Review (PFR) File, Tab 1. The appellant has filed a response in opposition.⁵ *Id.*, Tabs 2-4.

ANALYSIS

¶7 In order to establish Board jurisdiction in an appeal from the cancellation of a promotion or an appointment, an appellant must show that: (1) the promotion or appointment actually occurred; that is, that it was approved by an authorized appointing official aware that he or she was making the promotion or

⁴ The appellant has moved to dismiss the agency's petition for review as untimely filed, asserting that the petition was received by the Board on May 20, 2010, and that the initial decision became final on May 19, 2010. PFR File, Tab 6 at 4. The initial decision provides that a petition for review must be "filed" by May 19, 2010. Initial Decision at 13. The agency's petition for review was sent by overnight commercial delivery service on May 19, 2010, and received by the Board on May 20, 2010. PFR File, Tab 1 at 92. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. [5 C.F.R. § 1201.4\(l\)](#). Accordingly, the agency's petition for review was timely filed.

⁵ The appellant's first submission on review was styled as a cross petition for review. *See* PFR File, Tab 2. The appellant subsequently clarified that he did not intend to file a cross petition but rather intended to file a response to the agency's petition for review. *Id.*, Tab 3 at 3.

appointment; (2) the appellant took some action denoting acceptance of the promotion or appointment; and (3) the promotion or appointment was not revoked before the appellant actually performed in the position. *Deida v. Department of the Navy*, [110 M.S.P.R. 408](#), ¶ 14 (2009). Where a promotion to a higher grade never went into effect, there was not an appealable reduction in grade or pay. *Clark v. Department of the Interior*, [68 M.S.P.R. 453](#), 457 (1995).

¶8 No appointment of a federal employee can occur in the absence of the “last act” required by the person or body vested with appointment power. *McGovern v. Equal Employment Opportunity Commission*, [28 M.S.P.R. 689](#), 692 (1985) (citing *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 2 L. Ed. 60 (1803)). In this regard, the Board has determined that rather than placing total reliance on the absence or presence of an SF-50, Notice of Personnel Action, in determining whether an appointment has been effected, it will examine the totality of circumstances surrounding the appointment to determine whether the requisite “last act” of an official with appointment power has taken place. *Scott v. Department of the Navy*, [8 M.S.P.R. 282](#), 287 (1981); see *Scott v. Department of the Air Force*, [113 M.S.P.R. 434](#), ¶ 8 (2010); *Thompson v. Immigration and Naturalization Service*, [9 M.S.P.R. 112](#), 113 (1981); see also *National Treasury Employees Union v. Reagan*, [663 F.2d 239](#), 246 (D.C. Cir. 1981). In this regard, one of the dispositive issues to be considered is whether the official with the appropriate authority took, authorized, or ratified any action which reasonably could be said to have resulted in an appointment or promotion. *Scott*, 8 M.S.P.R. at 287.

¶9 Relying on *Thompson v. Immigration and Naturalization Service*, the agency asserts in its petition for review that no one with authority ever approved the appellant’s promotion to a salary of \$89,004 and that no one with appointment power, who is typically a representative at the Human Resources Service Center (HRSC), ever signed an SF-50 effecting the appellant’s promotion to that level. PFR File, Tab 1 at 9-10. The agency asserts that the administrative judge erred in

determining that Mr. Minnick's salary recommendation and Tobey Cole's⁶ premature conveyance of that recommendation to the appellant constituted a binding offer of that salary. *Id.* at 6-7. The agency emphasizes that no one at NAVFAC MIDLANT ever authorized a salary of \$89,004 for the appellant and that an official at NAVFAC MIDLANT rejected Mr. Minnick's \$89,004 salary recommendation on two separate occasions. *Id.* at 7. The agency further asserts that no one at HRSC saw the appellant's paperwork until officials at NAVFAC MIDLANT had set his salary at \$84,958. *Id.* at 10-11. The agency therefore maintains that the appellant was never promoted to a salary of \$89,004 per year, and, thus, he did not suffer a cancellation of a promotion or an appealable reduction in pay when his salary was set at \$84,959 and later \$86,116 per year.⁷ *Id.* at 11. We agree.

¶10 The agency's selection process under the NSPS is set forth in NAVFAC Atlantic Instruction 12335.5 as submitted into the record by the agency. IAF, Tab 21 at 26-37. Instruction 12335.5 provides that "[m]anagement officials at

⁶ Ms. Cole is the Human Resource Specialist at the Naval Air Warfare Center who processed the appellant's personnel actions. HT at 21.

⁷ The agency submits three documents for the first time with its petition for review. *See* PFR File, Tab 1 at 16-17, 91. It submits a May 17, 2010 affidavit from Richard Carr, Head of the Customer Service Department at HRSC Northeast, who states that his staff prepared the appellant's SF-50s for his reassignment and promotion. *Id.* at 91. In his affidavit, Mr. Carr states that the appropriate procedures and approvals for the appellant's promotion were not completed until September 30, 2009, indicating that the permanent personnel actions cannot be made effective until October 1, 2009. *Id.* Mr. Carr states that on May 13, 2010, the appellant's SF-50s were corrected to designate the promotion that was effective September 27, 2009, as a temporary promotion not to exceed 60 days and to make the temporary action permanent on October 1, 2009, based on the date of the completion of the recruitment process. *See id.* at 16-17, 91. The agency also submits the SF-50s discussed by Mr. Carr. *Id.* at 16-17. Assuming, for the sake of argument, that these documents are new, i.e., the information in the documents was unavailable before the record closed below despite the agency's due diligence, *see Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980), they are not material to the question of whether an appointing official approved the appellant's promotion with a salary of \$89,004.

Pay Band 2 or higher level will make all selections and be designated as selecting officials.” *Id.* at 26. It further provides that “[t]he next higher level manager in the chain of command will be the approving official.” IAF, Tab 21 at 26. Pursuant to the Interim Guidance regarding Pay Administration under the National Security Personnel System, “[w]hile a selecting official determines and authorizes a pay action, that official cannot promise an employee any specific pay rate.” IAF, Tab 21 at 43. Instead, the “appointing official” takes formal action to set the proper rate of pay. *Id.*

¶11 The Interim Guidance requires managers to submit documentation supporting a promotion pay increase greater than 6 percent to the Human Resources Office (HRO) for forwarding to the appropriate HRSC. *Id.* at 50. It explains that “[a]uthority to formally set pay . . . rests with appointing officials, typically a Code 50 representative at the HRSC.” *Id.* at 57. It further explains that the “appointing official is the officer with the authority to certify the standard form (SF)-52 or the SF-50.” *Id.*

¶12 We note that the Interim Guidance provides that “[a]ll approvals must be obtained before a final or firm offer can be extended to an applicant. Offers will be communicated in accordance with established staffing policies after all reviews and approvals are completed. HR (typically the HRSC) will extend formal job offers in accordance with local procedures.” *Id.* at 48. Similarly, Instruction 12335.5 provides that HRO will communicate the results of the selection to the selectee; “[n]either the selecting official [nor the] approving official . . . will discuss the selection with anyone outside the selection process under any circumstances . . . prior to HRO contact with the selectee.” *Id.* at 34.

¶13 In the instant case, Mr. Mignogna testified that he was the approving official and that Mr. Minnick was the selecting official. HT at 8, 10. Mr. Mignogna explained that in the appellant’s case the PSW requested a promotion with a 10 percent increase in salary but that, when the PSW “came back down”

late in the day on September 30, 2009,⁸ it had been changed to a reassignment with a 5 percent increase as determined by the “[r]eview [c]hain.” *Id.* at 13-14. He further testified that the appellant “reluctantly” accepted the offer of reassignment and that the reassignment was processed and made official on September 30, 2009. *Id.* at 14.

¶14 Ms. Cole testified that the “actual action to assign [the appellant] to the new position could not be effective until the HR[S]C received the signed approved [PSW].” HT at 28. She testified that she mistakenly told Mr. Minnick that the appellant could be paid up to \$105,000, but that she realized she made an error in her calculations. HT at 26. She testified that Mr. Minnick drafted the PSW recommending a 10 percent raise to \$89,004 and forwarded it to his supervisor, Mr. Mignogna. *Id.* at 27-28. She explained that Mr. Mignogna forwarded the PSW to NAVFAC MIDLANT in Norfolk. *Id.* at 28-29. She testified that when the PSW was returned, the action was deemed to be a reassignment with a 5 percent pay increase to a salary of \$84,958. *Id.* at 30. She further testified that she then called the appellant, who accepted the position because he knew the agency needed to fill and process the position he vacated within the same timeframe. *Id.* at 30-31. Ms. Cole confirmed that the appellant could have declined the offer and that the hiring process would have started over and been completed under the Department of the Air Force system after October 1. *Id.* at 33.

¶15 The record contains a PSW for the appellant’s appointment to the position of Supervisory Production Superintendent signed by Mr. Minnick, as the “Recommending Official,” proposing the appellant’s promotion and a salary of \$89,004.28 per year, a 10 percent increase. IAF, Tab 9, Exhibit 4f. The PSW

⁸ While Mr. Mignogna testified that the PSW was returned on September 30, 2009, *see* HT at 13-14, the agency asserts in its pleadings that this occurred on September 29, 2009, *see* IAF, Tab 21 at 5.

does not have a signature in the sections labeled “Budget Approval” or “Approving Official.” *Id.* at 2. The record also contains an SF-50 reassigning the appellant to the position of Supervisory Production Superintendent, effective September 27, 2009, at a salary of \$84,958. IAF, Tab 9, Exhibit 4c. This SF-50 therefore reflects the decision by NAVFAC MIDLANT that the appellant’s appointment constituted a reassignment with a 5 percent increase in salary as opposed to a promotion with a 10 percent increase in salary as originally recommended by Mr. Minnick and Mr. Mignogna. *See id.*

¶16 The record also contains a PSW recommending a promotion for the appellant and a 6.43 percent salary increase to \$86,116 per year. IAF, Tab 9, Ex. 4e. The PSW is signed by Mr. Minnick, as the “Recommending Official,” and is signed by Damon Diggs, for “Budget Approval,” and by Jean Dunlap, as the “Approving Official.”⁹ *Id.* at 2; *see* HT at 20 (testimony of Mr. Mignogna that Damon Diggs signed for Budget Approval and that Jean Dunlap signed for “Public Works Business Line Approval”). An SF-50, effective September 27, 2009, confirms the appellant’s promotion with a salary of \$86,116 per year. IAF, Tab 18 at 4.

¶17 We find, based on the testimony and the documentary evidence, that a promotion of the appellant to a salary of \$105,000 or \$89,004 was not approved by an authorized appointing official aware that he or she was making the promotion or appointment. *See Deida*, [110 M.S.P.R. 408](#), ¶ 14. To the extent that Mr. Minnick or Ms. Cole notified the appellant of a potential salary of \$105,000 or \$89,004, under the Interim Guidance neither had the power or authorization to promise the appellant any specific pay rate. *See* IAF, Tab 21 at 43. Rather, the Interim Guidance requires an appointing official to set the proper

⁹ Mr. Mignogna testified that the PSW recommending and approving a promotion and 6.43 percent raise for the appellant was “obviously back dated” to September 29, 2009. HT at 20. The SF-50 documenting the promotion was approved on January 27, 2010. IAF, Tab 18 at 4.

rate of pay. *Id.* at 43, 57. Therefore, the administrative judge erred in finding that the appellant was officially offered a 10 percent raise on September 29, 2009. *See* Initial Decision at 11. There is no evidence that an appointing official, i.e., an officer with the authority to certify an SF-52 or SF-50, approved a promotion for the appellant at a salary of \$105,000 or \$89,004. *See id.* Accordingly, the administrative judge erred in finding that the appellant was promoted to a salary of \$89,004 and that the agency revoked that promotion. *See* Initial Decision at 10.

¶18 The record evidence demonstrates that an appointing official first approved the appellant's reassignment to the position of Supervisory Production Superintendent with a 5 percent raise to \$84,958, contrary to the selecting official's and approving official's recommendation of a promotion with a 10 percent raise to \$89,004. *See* IAF, Tab 9, Ex. 4c. Subsequently, an appointing official agreed that the appellant's reassignment actually constituted a promotion and approved the appellant's promotion with a 6.43 percent raise to \$86,116. *See id.*, Ex. 4e; IAF, Tab 18 at 4. Because the appellant was never promoted to a salary of \$89,004, he did not suffer an appealable reduction in pay when his salary was set to \$84,958 and later to \$86,116. *See Clark*, 68 M.S.P.R. at 457. The administrative judge's determination otherwise was in error. *See* Initial Decision at 11-12.

ORDER

¶19 Because the appellant did not suffer an appealable reduction in pay, we DISMISS the appeal for lack of jurisdiction. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.